* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXXX's.

August 5, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 19, 2003

Case Number: TSO-0024

This Decision concerns the eligibility of xxxxxxxxxxxxxxxxxxx (hereinafter referred to as "the individual") to hold an access authorization under the Department of Energy (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled "General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." 1/ A DOE Office suspended the individual's access authorization pursuant to the provisions of Part 710. As discussed below, after carefully considering the record before me in light of the relevant regulations, I have determined that the individual's access authorization should not be restored.

I. Background

The individual has been employed for many years by DOE contractors in positions that required him to maintain an access authorization. In 1989 the individual executed a Drug Certification in which he agreed to refrain from using or becoming involved in any way with illegal drugs while holding a DOE security clearance. During a routine reinvestigation in 2002, the individual completed security forms in which he responded negatively to the questions asking whether he had ever illegally used controlled substances in the last seven years, or while possessing a security clearance. A few months later, the individual admitted to the DOE that he had used marijuana in 1995, 1999-2000, and 2001.

The individual's revelations about his recent drug use constituted derogatory information that falls within the purview of three potentially disqualifying criteria set forth in the security regulations at 10 C.F.R. § 710.8, subsections f, k, and l (Criteria F, K and L respectively). 2/ Because the

---

1/ Access authorization is defined as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

2/ Criterion F concerns information that a person has "[d]eliberately misrepresented, falsified, or omitted significant information from a Personnel Security Questionnaire, a Questionnaire for Sensitive National Security Positions, a personnel security interview, written or oral statements made in response to official inquiry on a

(continued...)

derogatory information created substantial doubt regarding the individual's continued eligibility to hold a DOE security clearance, the DOE suspended his clearance and initiated formal administrative review proceedings.

The specific derogatory information at issue is described in an attachment to the Notification Letter issued by a DOE Security Office to the individual in 2002. With regard to Criterion F, the Notification Letter alleges the following concerns:

- On February 19, 2002, the individual certified in a Questionnaire for National Security Positions (QNSP) that he had not used or purchased any illegal substance in the past seven years;
- During a Personal Security Interview (PSI) conducted by DOE Security on June 12, 2002, the individual admitted to purchasing one-half ounce of marijuana and using it over a six-month period beginning in August 1999. The individual also admitted to smoking marijuana once in November 2001;
- The individual stated during the PSI that he deliberately falsified the QNSP because he believed the use of marijuana should be legal.

As for Criterion K, the Notification Letter cites as a security concern the individual's statements that he used marijuana in 1994 or 1995, from August 1999 to February 2000, and in November 2001.

The bases for the DOE's Criterion L concerns are the individual's multiple violations of the Drug Certification that he had executed in 1989 as well as his statement during the PSI that he knew it was wrong to use illegal drugs while holding a security clearance.

On March 19, 2003, the Office of Hearings and Appeals (OHA) received the individual's response to the allegations contained in Notification Letter and his request for an administrative review hearing in this matter. On March 20, 2003, the OHA Director appointed me as the Hearing Officer

---

2/ (...continued)

matter that is relevant to a determination regarding eligibility for DOE access authorization, or proceedings conducted pursuant to § 710.20 through § 710.31." 10 C.F.R. § 710.8(f).

Criterion K relates to information that a person has "[t]rafficked in, sold, transferred, possessed, used, or experimented with a drug or other substance listed in the Schedule of Controlled Substances established pursuant to section 202 of the Controlled Substances Act of 1970 (such as marijuana, cocaine, amphetamines, barbiturates, narcotics, etc.) except as prescribed or administered by a physician licensed to dispense drugs in the practice of medicine, or as otherwise authorized by Federal law." 10 C.F.R. § 710.8(k).

Criterion L pertains to information that a person has "[e]ngaged in any unusual conduct or is subject to any circumstances which tend to show that the individual is not honest, reliable, or trustworthy; or which furnishes reason to believe that the individual may be subject to pressure, coercion, exploitation, or duress which may cause the individual to act contrary to the best interests of the national security. Such conduct or circumstances include, but are not limited to, criminal behavior, a pattern of financial irresponsibility, conflicting allegiances, or violation of any commitment or promise upon which DOE previously relied to favorably resolve an issue of access authorization eligibility." 10 C.F.R. § 710.8(l).

in this case and I convened a hearing in accordance with the Part 710 regulations. 10 C.F.R. § 710.25 (a), (b), (g).

At the hearing, five witnesses testified. The DOE called a personnel security specialist. The individual presented his own testimony and that of a co-worker, a former supervisor and a current supervisor. The DOE submitted 11 documents into the record (Exhibits 1-11); the individual tendered 10 exhibits (Exhibits A through J). On June 30, 2003, I received the hearing transcript at which time I closed the record in this case.

II. Regulatory Standard

A. The Individual's Burden

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the standard in this proceeding places the burden of persuasion on the individual because it is designed to protect national security interests. The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting of security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

An administrative review hearing is conducted "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE Security has made a showing of derogatory information raising security concerns, the individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). The individual therefore is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The regulations at Part 710 are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Thus, by regulation and through our own case law, an individual is afforded the utmost latitude in the presentation of evidence to mitigate security concerns.

B. Basis for the Hearing Officer's Decision

In personnel security cases arising under Part 710, it is my role as the Hearing Officer to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). I am instructed by the regulations to resolve any doubt as to an individual's access authorization eligibility in favor of the national security. *Id.*

III. Findings of Fact

As early as 1976, questions regarding the individual's drug use came to the attention of a local DOE Security Office. According to the record, the individual provided the DOE with information about his use of drugs, including marijuana, during a Personnel Security Interview conducted in 1976. Exhibit (Ex.) 5. At that time, the individual provided verbal assurance that he would not use any illegal drugs as long as he was employed in a position requiring a security clearance. *Id.* €

In 1989 the individual signed a Drug Certification in which he agreed, among other things, not to use illegal drugs at any time while holding a DOE security clearance. Ex. 6. It is not clear from the record what prompted the DOE to require the individual to execute a Drug Certification.

Three years later in 1992, the individual completed and executed a Questionnaire for Sensitive Positions (QSP) as part of the routine reinvestigation process. Ex. J. On the QSP, the individual indicated that he had neither used drugs in the last five years nor had experienced any problems on or off a job from the use of any illegal drugs. The individual also initialed the lower right hand corner of each page of the QSP.

The individual's next routine reinvestigation occurred in 2002. 3/ According to the record, the local DOE Security Office's standard procedure for reinvestigations is **not** to provide a blank QNSP for an employee's completion. Instead, the local DOE Security Office types a QNSP for an employee's review and signature, using information from the employee's most recently completed security document. *Id.* If the employee makes changes to the pre-typed QNSP, the local Security Office may

3/ There was so much confusion in the record about the paperwork pertaining to the individual's 2002 reinvestigation and the local DOE Security Office's standard practices and procedures with regard to the reinvestigation process that I directed the DOE Counsel to provide additional information into the record after the hearing. It was my determination after listening to the testimony at the hearing and reviewing the individual's post-hearing submission that I needed additional information in the record in order to obtain all the facts reasonably necessary for me to make informed findings in the case. On June 18, 2003, the DOE Counsel tendered responses to the specific written inquiries that I had made into certain matters. I have taken the liberty of marking the DOE responses as Exhibit 11. The individual's attorney elected not to respond to the DOE's June 2003 submission.

retype those changes for legibility, but the retyped document may not be returned for a second signature. *Id.* 4/The employee is also asked to initial every page of the QNSP. 5/

During the 2002 reinvestigation process, the local DOE Security Office provided the individual with several documents in addition to the pre-typed QNSP. Two of those documents are germane to one of the issues before me. One is a letter from the Team Leader of the local DOE Security Office's Personnel Security Team that contains the following language that was highlighted in yellow: **"All pages on the QNSP must be initialed on the bottom right once you have verified that all data was entered correctly.**" Ex. I. The other is a Memorandum from the Director, Office of Security and Emergency Services to all applicants and holders of DOE Security Clearances. Ex. 2. The Memorandum summarizes the DOE's policy on falsification and specifically addresses the illegal drug question on the QNSP. *Id.* In the Memorandum, the Director states that some people erroneously believe that any and all past illegal drug use automatically disqualifies a person from holding a security clearance. *Id.* The Director explains that every case is evaluated on a case-by-case basis. He concludes by reiterating that persons must be totally truthful and accurate in filling out their QNSPs. *Id.* As required, the individual signed the Memorandum on February 19, 2002 certifying that he had read and understood the DOE's policy on falsification as set forth in the memorandum. *Id.*

On that same day, February 19, 2002, the individual signed his QNSP. He did not, however, initial the lower right hand corner of each page of that document. Ex. 1. Questions 24(a) and 24(b) on the QNSP ask about a person's use of illegal drugs and drug activity. The pre-typed responses to those questions on the individual's QNSP were "no." The individual did not change the pre-typed answers to those two questions.

The individual underwent surgery in March 2002 to alleviate chronic pain associated with the amputation of one of his limbs many years ago. Ex. C. He remained on disability until sometime in May 2002. Ex. 10 at 14.

4/ The record shows that the clerk typist in the local Security Office made several incorrect entries on the individual's official QNSP when he or she attempted to take information from interlineations made by the individual on the pre-typed form and transfer them to the official form. Since the retyped forms were not given to the individual for his review after the typist made the corrections, these errors were only uncovered after I questioned inconsistencies between Exhibit 1 and other drafts of that security form. While this practice raises general questions about the accuracy of security documents altered by typists and not reviewed by employees, I have concluded that none of these errors made by the typist in this case relate to the questions pertaining to the individual's past drug use or other matters before me.

5/ There is a discrepancy in the record about whether a QNSP that bears no initials on each page is returned to the employee who failed to initial the security document. At the hearing, the Personnel Security Specialist testified that she could not explain why the QNSP in this case was not returned to the individual for his initials, implying that under ordinary circumstances the document would be returned to the employee for his or her initials. However, the DOE Counsel in his post-hearing submission stated as follows: "The subject is also asked to initial every page. However, if the subject does not do so, it will not be returned for his initials." Ex.11 at 3.

On May 1, 2002, an investigator from the Office of Personnel Management (OPM) interviewed the individual as part of the routine background investigation. During the interview, the individual volunteered that he "had routinely used drugs while possessing a security clearance over the past 25 years." Ex. 10 at 3. The individual admitted using marijuana on a monthly basis during 1974-79, on a weekly basis during 1980-87, for a six-month period in 1995, on a daily basis from July 1999 through February 2000 and once in November 2001. *Id.* He added that he did not use any illegal drugs during 1988-94 or 1996-1998. He also admitted to the OPM investigator that he knew and understood the DOE's policy regarding the use of illegal drugs while maintaining a security clearance. He volunteered that he had intentionally falsified his security applications in years past and had lied to OPM investigators and DOE personnel regarding his past use of illegal drugs. He explained that he did not reveal his illegal drug use for fear of losing his job. According to the individual, it was his attorney who instructed him to divulge completely his past and present use of illegal drugs.

One month after the individual disclosed his falsification and drug use to the OPM investigator, a personnel security specialist from the local DOE Security Office interviewed the individual. During a PSI on June 12, 2002, the individual told a DOE personnel security specialist that he used the marijuana to control the pain he was experiencing because of his limb amputation. Ex. 7 at 28. He expressed his belief that marijuana use should be legal for certain medicinal purposes since the state in which he resides allows its residents to use marijuana for such purposes. *Id.* at 32. He also admitted during the PSI that he had deliberately lied on the QNSP regarding his use of drugs, but claimed that he did not initial each and every page of the security document because he intended to disclose his drug use in person when the DOE contacted him. *Id.* at 32. Finally, he admitted that he knew from his drug certification that he was not allowed to use illegal drugs while holding a DOE security clearance. *Id.* at 30.

At the request of the personnel security specialist, the individual voluntarily submitted a urine sample on June 12, 2002 for substance abuse testing. The results of drug test were negative. Ex. 8.

IV. Analysis and Findings

A. Security Concerns Associated with the Derogatory Information 6/

As noted earlier in this Decision, the derogatory information in this case arises from (1) the individual's false responses on the QNSP that he executed in 2002, (2) his repeated use of marijuana after having provided written assurance to the DOE in 1989 that he would not use illegal drugs, and (3) his use of marijuana in 1995, 1999-2000 and 2001 while holding a security clearance.

1. Falsification

It is undisputed that the individual deliberately lied on his 2002 QNSP about a significant matter, *i.e.*, his past use of illegal drugs. He falsified Question 24(a) on his 2002 QNSP that asked whether he had used illegal drugs within the last seven years, and Question 24(b) that asked if he had ever used illegal drugs while holding a security clearance.

From a security standpoint, false statements made by an individual in the course of an official inquiry regarding a determination of eligibility for DOE access authorization raise serious issues of honesty, reliability, and trustworthiness. The DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent the individual can be trusted again in the future. *See e.g.*,*Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,515 (1995), 25 DOE ¶ 82,752 (1995) (affirmed by OSA, 1995); *Personnel Security Hearing* (Case No. VSO-0281), 27 DOE ¶ 82,821 at 85,915 (1999), *aff'd*, 27 DOE ¶ 83,030 (2000) (terminated by OSA, 2000). In addition, the individual's deliberate falsification raises a security concern that he might be susceptible to coercion, pressure, exploitation, or duress arising from the fear that others might learn of the information being concealed. *See Personnel Security Hearing* (Case No. VSO-0289), 27 DOE ¶ 82,823 (1999), *aff'd*, 27 DOE ¶ 83,025 (2000) (affirmed by OSA, 2000). Based on the record before me, I find that the DOE correctly invoked Criterion F when it suspended the individual's security clearance.

6/ In his closing statement, Counsel for the individual pointed out that the DOE Counsel had failed to elicit testimony from the Personnel Security Specialist at the hearing about the nexus between the derogatory information at issue and the security concerns that arise because of that derogatory information. Transcript of Hearing (Tr.) at 97. I find that the individual was not prejudiced by the DOE Counsel's decision not to question the Personnel Security Specialist at the hearing about the security concerns associated with the derogatory information set forth in the Notification Letter. As an initial matter, Appendix B to Subpart A of 10 C.F.R. Part 710 specifically sets forth the security concerns associated with all the categories of derogatory information contained in Subpart A. Second, the publicly available Security Review cases on the OHA website explain the nexus between all of the criteria at issue in this case and DOE security concerns. Moreover, in most cases like this one the nexus between the derogatory information and the corresponding security concerns is self-evident. Finally, had Counsel for the individual wished to question the personnel security specialist about the nexus between the derogatory information in this case and the DOE's security concerns, he was free to do so at the hearing.

2. Violations of Drug Certification

The individual does not contest that he gave the DOE his personal commitment to refrain from using illegal drugs in the future. The record shows that the individual first made this promise verbally in the mid-1970s and then in writing in 1989. It is undisputed that the individual violated this commitment many times in 1995, 1999-2000 and once in 2001. This conduct raises legitimate questions about the individual's honesty, reliability, and trustworthiness under Criterion L. Compounding the security concerns surrounding the individual's drug use is the fact that he used marijuana not only while holding a security clearance but in spite of his awareness that the DOE's drug policy prohibited such use.

3. Illegal Drug Use

The individual admitted to both the OPM investigator and the DOE personnel security specialist that he used illegal drugs in 1995, 1999-2000 and 2001. The security concern associated with this conduct is whether the individual can be trusted to respect laws and regulations, including those governing the security of classified information and facilities, in view of his willful disregard for the federal law 7/ prohibiting the use of illegal drugs. *See Personnel Security Hearing* (Case No. VSO-0083), 25 DOE ¶ 82,807 (1996) (affirmed by OSA, 1996); *Personnel Security Hearing* (Case No. VSO-0540) *http://www.oha.doe.gov/cases/security/vso0540.pdf*. In addition, depending on the degree of mental impairment caused by the use of the illegal drug, there is an increased risk that a person in an impaired state due to drug usage may disclose classified information or otherwise compromise national security. *Id.*

4. Summary

For the reasons set forth above, I have determined that the DOE properly cited Criteria F, K, and L as bases for suspending the individual's security clearance. However, a finding of derogatory information does not end the evaluation of evidence concerning the individual's eligibility for access authorization. *See Personnel Security Hearing* (Case No. VSO-0244), 27 DOE ¶ 82,797 (1999) (affirmed by OSA, 1999); *Personnel Security Hearing* (Case No. VSO-0154), 26 DOE ¶ 82,794 (1997), *aff'd*, Personnel Security Review (Case No. VSA-0154), 27 DOE ¶ 83,008 (1998) (affirmed by OSA, 1998). I turn next to the documentary and testimonial evidence presented by the individual to mitigate the DOE's legitimate security concerns in this case.

7/ The state in which the individual resides permits the use of marijuana for certain medicinal purposes. Even if the individual's use of marijuana to ease his chronic pain was legal under state law, his use of that illegal drug still violated federal law because marijuana is identified and listed in the Controlled Substances Act of 1970, as amended. In addition, the individual was aware that federal law prohibits the use of marijuana. Tr. at 32.

B. Mitigating Evidence

1. Criterion F

At the hearing, the individual testified that he struggled with the questions on the QNSP about his past illegal drug use. Tr. at 54. He explained that he felt that he was using marijuana for a legal purpose since the state in which he resides permits the use of marijuana for some medicinal purposes, including intractable pain. *Id.* At the same time, he thought that if he revealed his marijuana use on the QNSP without being able to explain the circumstances of that use, he would be fired. *Id*. at 80.

The individual further testified that he did not change the responses to Questions 24(a) and (b) on the pre-typed QNSP because he intended to discuss his drug use personally with DOE. *Id* at 54. The individual expected that someone from the DOE would contact him if he failed to complete the QNSP according to the instructions that he had received on Exhibit I. For this reason, the individual did not initial each page of the QNSP. Under questioning at the hearing, the individual stated his belief that he could discuss questions about the QNSP with DOE Security only after the QNSP had been submitted. *Id.* at 83.

Finally, the individual pointed out at the hearing that he voluntarily disclosed his falsification to the OPM investigator in May 2002 and to the DOE in June 2002.

a. Evaluation of Criterion F Evidence

Cases involving verified falsifications are difficult to resolve because there are neither experts to opine about what constitutes rehabilitation from lying nor security programs to achieve rehabilitation. Therefore, Hearing Officers must look at the statements of an individual, the facts surrounding the falsification and the individual's subsequent history in order to assess whether the individual has rehabilitated himself from the falsehood and whether restoring the security clearance would pose a threat to national security. *See Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd, Personnel Security Review*, (Case No. VSA-0327), 28 DOE ¶ 83,005 (2000) (affirmed by OSA, 2000); *Personnel Security Hearing* (Case No. VSO-0418), 28 DOE ¶ 82,795 at 85,705 (2001).

i. Facts Surrounding the Falsificaton

As an initial matter, I find that the individual's falsification is a serious matter. Lying on the form that supplies the information on which a security clearance is granted or continued subverts the integrity of the access authorization process.

The individual does not contest that he knowingly and willingly executed the last page of the QNSP. The certification that precedes the individual's signature states as follows: "My statements on this form, and any attachments to it, are true, complete, and correct to the best of my knowledge and

belief and are made in good faith. I understand that a knowing and willful false statement on this form can be punished by fine or imprisonment or both." Ex. 1 at 9.

With regard to the individual's contention that he vacillated in responding truthfully to the illegal drug question on the QNSP because he believed that he was legally using the drug under state law, I find that the evidence clearly shows that the individual knew that his use of marijuana violated federal law and the DOE's drug policy. *See* Ex. 7 at 30, 3; Tr. at 78.

As for the individual's contention that he lied because he feared losing his job, I reject this excuse on two grounds. First, the argument is self-serving. Second, the DOE specifically informed the individual in writing that the past use of illegal drugs does not automatically disqualify a person from holding a security clearance. *See* Ex. 2. While the individual claimed that he did not recall reading the memorandum submitted as Exhibit 2, he testified that he must have read the document because he signed it. *Id.* at 80-81. By signing Exhibit 2 on February 19, 2002, the individual certified that he had read and understood DOE's policy on falsification as summarized in the memorandum.

There are some unique circumstances, however, that surrounded the individual's falsification. While it is true that the individual signed the last page of the QNSP certifying the truthfulness of all his responses on that form, the individual testified credibly that he thought that he needed to initial each and every page of the QNSP in order to verify that the information on each and every page was correct. The individual cites his reliance on the highlighted portion of Exhibit I that states:, "All pages on the QNSP must be initialed on the bottom right once you have verified that all data was entered correctly." Ex. I. At the hearing, the Personnel Security Specialist confirmed under cross examination that Exhibit I indicates that only by initialing each and every page of the QNSP does an employee verify that its contents are true and correct. Tr. at 23.

In evaluating the evidence in this case regarding the Criterion F allegations, I carefully considered and ultimately rejected the possibility that the individual seized upon his failure to initial every page of the QNSP as post-hoc justification for his behavior. The record shows the individual first related his rationale to the DOE for not initialing every page of the QNSP prior to the suspension of his security clearance. Ex. 7 at 32. I also considered that the individual did not personally complete the QNSP question by question as some DOE facilities require but rather reviewed each page of a pre-typed QNSP for accuracy. Because the local DOE Security Office pre-types security forms using information from previously submitted forms, I find that the act of verifying each and every page on the pre-typed form for accuracy is not simply a bureaucratic requirement with little intrinsic value but a substantively important act. I find also that it was not unreasonable for the individual to have believed, based on the fact that he did not personally complete the QNSP and in reliance on Exhibit I, that his initials were required on every page of the pre-typed form in order to certify the accuracy of the information on each page.

At the hearing, the individual convincingly testified that he thought that the DOE would return the QNSP to him when it discovered that the form did not contain the requisite initials. 8/ In addition, he provided credible testimony that he intended to explain the dilemma confronting him about how to respond to Questions 24(a) and (b) when someone from the DOE contacted him.

After carefully examining and weighing the evidence in this case, I make the following findings. By executing the last page of the QNSP, the individual certified that his responses on all pages of the QNSP, including his responses to Questions 24(a) and (b) were true. He knew at the time that he signed the last page of the QNSP that the pre-printed answers to the illegal drug questions were false. Hence, I find that the individual deliberately falisfied the QNSP when he signed that security document. At the same time, the individual did not initial every page of the QNSP as required by the local DOE Security Office. Thus, he consciously chose not to compound his falsehoods by certifying them a second time. In the end, I find that the individual's decision not to initial each page of the QNSP did not negate the certification provided by his signature on the last page of QNSP.

ii. Statements of the Individual

I next considered whether the falsifications at issue can be properly characterized as an isolated incident. In so doing, I accorded substantial weight to the statements made by the individual to the OPM investigator. While the individual is only charged with providing false information in his 2002 QNSP, I am required to view the totality of the evidence, both favorable and unfavorable in arriving at sound findings on each allegation contained in the Notification Letter. In this case, the individual admitted to the OPM investigator that he had intentionally falsified his security forms in the years past and had lied to other OPM investigators and DOE personnel security specialists regarding his past use of illegal drug use. Ex. 10 at 3. 9/ This statement, standing alone, is strong evidence that the individual's 2002 falsification cannot be mitigated as a one-time occurrence. The totality of the evidence in the case therefore compels me to find that the falsification at issue was not an isolated incident.

As for the nature of the individual's disclosure, the OPM Report clearly states that the individual "volunteered" the information about the falsifications on his 2002 QNSP. Ex. 10 at 3. It appears that

---

8/ The Personnel Security Specialist affirmed at the hearing that she, too, was surprised that the QNSP was not returned to the individual for initialing. Tr. at 23.

9/ Specifically, the individual told the OPM investigator that he used marijuana weekly during 1980 to 1987. He also told the investigator that he did not use marijuana from 1988 to 1994. The individual's statements in the OPM Report strongly suggest that the individual may have lied on the 1992 QSP that he submitted as Exhibit J. Question 25 on the 1992 QSP asks if the individual had used illegal drugs in the last five years. The individual executed that QSP on February 28, 1992. Five years prior to February 28, 1992 is February 28, 1987. Since the individual told the OPM investigator that he used marijuana weekly during the period 1980 to 1987, it appears that his response to Question 25 was a falsehood. Nevertheless, since the DOE did not include any allegations in the Notification Letter about the individual's responses in his 1992 QSP, I will not make a finding on this matter.

the individual made a good faith effort based on advice from his attorney to correct the falsification about his prior illegal drug use when he met with the OPM investigator. His disclosure to the OPM investigator supports his contention that he intended to correct the record as soon as he could talk to someone in person. In evaluating the voluntariness of the self-disclosure, however, I also considered that the individual's spouse provided specific information to the OPM investigator about the individual's drug use in 1995 and 2001. Ex. 10 at 6. Since the OPM investigator received information from the individual's spouse that contradicted the individual's QNSP responses regarding drug use, it is likely that the OPM investigator would have confronted the individual about this matter. This likelihood raises a question in my view whether the individual had a dual motive in reporting his falsification, i.e., his desire to explain the dilemma he had in responding to the QNSP questions, and a fear of being confronted with information furnished by his spouse during the background investigation. In other cases, Hearing Officers have found that a self-disclosure is not voluntary for purposes of the Part 710 regulations when there is evidence that a person's admission is tied to a fear that someone would reveal a lie. *See e.g.*, *Personnel Security Hearing* (Case No. VSO-0327), 27 DOE ¶ 82,844 (2000), *aff'd*, *Personnel Security Review*, 28 DOE ¶ 83,005 (2000) (affirmed by OSA 2000). Ultimately, it is the individual's burden to convince me that his admission was voluntary. Because the individual did not dispel my concern about his possible dual motive in providing information to the OPM investigator, I can only accord neutral weight to the individual's disclosure.

iii. Subsequent History

In evaluating whether the individual has demonstrated reformation or rehabiliation from his falsification, I considered several matters. First, I noted that acknowledging wrongdoing and taking full responsiblity for one's actions are important and necessary steps in the process of reformation. *Personnel Security Hearing* (Case No. VSO-0440), 28 DOE ¶ 82, 807 (2001) (affirmed by OSA, 2001). In this case, the individual clearly acknowledged his wrongdoing when he admitted the erroneous response on his 2002 QNSP and his previous lies to DOE security officials about the nature and extent of his past drug use. It is less clear to me, based on the individual's testimony and my observation of his demeanor at the hearing, that the individual fully understands the seriousness of his falifications or is taking responsiblity for his actions. In this regard, I note that the individual did not express remorse for his falsifications and provided no assurance that he will provide candid responses in the future to the DOE about matters potentially impacting his access authorization.

Second, I also considered whether the individual has comported himself in an honest, responsible, trustworthy manner since his admission that he had lied to the DOE about his past drug use. The only evidence on this point is from three character witnesses who testified as to their general belief that the individual is honest, trustworthy and responsible. One witness, the individual's former supervisor, did not even know why the individual's access authorization had been suspended so he could provide little insight into whether the individual has been rehabilitated from his lying. Tr. at 39. A second witness, the individual's co-worker, knew that the individual had disclosed his past illegal drug use and commented on how his disclosure demonstrates the individual's honesty. *Id.* at 44-45. It is not clear from the second witness's testimony whether the witness knew about the individual's past falsehoods. The third witness, the individual's current supervisor, also knew about

the individual's illegal drug use disclosure but provided no insight into whether he knew that the DOE was concerned about the individual's falsifications. In the end, because none of the three witnesses knew the the individual had lied to the DOE about his past illegal drug use, I cannot accord much weight to their testimony as it relates to the individual's rehabiliation from his lying.

iv. Other Factors

In evaluating the length of time the individual concealed the truth from the DOE, I find that the individual maintained his falsehood for a ten week period, four to six weeks of which he was on disability leave recuperating from surgery. While a 10 week period is not a lengthy period of deception, neither is it so short that I can dismiss it as insignificant. For this reason, I find that the duration of the falsehood is neither a positive nor negative factor in the case.

I also considered that the individual was a mature individual at the time he executed his 2002 QNSP. For this reason, I cannot ascribe his falsification to immaturity.

I also find that the potential for blackmail, coercion, or duress has not been resolved because at least three witnesses did not know about the individual's falsifications.

Finally, I accorded neutral weight to the individual's good performance evaluations because they only show that the individual was performing his job responsibilities as required by his employer. They do not provide evidence about the individual's integrity or lack thereof.

b. Summary

The key issue with regard to Criterion F is whether the individual has brought forward sufficient evidence to demonstrate that he can now be trusted to be consistently honest and truthful with the DOE. While there are certainly several factors in the individual's favor, I find that the individual has not provided sufficient documentary and testimonial evidence to show that he is rehabiliated or reformed from his past falsifications. For this reason, I find that the individual has not mitigated the Criterion F allegations.

2. Criterion L

To mitigate the Criterion L concerns, the individual presented the testimony of a co-worker, a former supervisor, and his current supervisor who collectively expressed their opinion that the individual is honest, reliable and trustworthy. The individual also suggests that his multiple breaches of his drug certification should be absolved because he used marijuana, in part, for medicinal purposes.

The overwhelming weight of evidence in this case compels me to find that the individual has not mitigated the DOE's Criterion L concerns. The individual deliberately and repeatedly abrogated commitments upon which the DOE relied in granting or continuing the individual's security clearance.

The record indicates that in 1976 the individual first provided verbal assurance to the DOE that he would not use illegal drugs while holding a security clearance. By his own admission, he used marijuana monthly from the time he provided that assurance in 1976 until 1979. He then increased his marijuana usage to weekly from 1980 to 1987. In 1989, the individual provided assurance to the DOE again that he would not use illegal drugs while holding a security clearance. This time the assurance was in writing.

Despite his previous commitments to the DOE that he would refrain from using illegal drugs, the individual used marijuana for a six-month period in 1995. He next used marijuana every day between July 1999 and February 2000. Finally, the individual's last reported marijuana use was November 2001.

Based on my review of the record and my observation of the individual at the hearing, I find that the individual does not grasp the seriousness of his violation of the written pledge that he made to the DOE. The individual provided no testimony that he took the drug certification seriously when he executed it or takes it seriously now. Further, during the course of this administrative review process the individual has not demonstrated any remorse for his multiple abrogations of the promises that he made to the DOE. In addition, he testified that he knew the DOE's policy against the use of illegal drugs during the entire time that he held a security clearance, yet he provided no relevant insight at the hearing into why he totally disregarded his personal commitment to the DOE more than 200 times. 10/ Tr. at 78. The individual also failed to convince me, despite his statements to the contrary, that he will not use marijuana again. For all these reasons, I am unable to find that the individual's breach of his drug certification is unlikely to recur in the future.

As for the individual's defense that he used marijuana for medicinal purposes, I find his argument unavailing for several reasons. First, it appears from the record that the individual's 1995 marijuana usage with his wife may have been recreational not medicinal. When asked at the hearing about his drug usage in 1995, the individual responded, " They hadn't come out with a law that you could use marijuana for pain control, and I don't know if consciously or subconsciously that I was doing that, you know, what I'm saying? I don't think consciously that I used marijuana for pain control at that time but it could have been subconscious." *Id.* at 84. Second, even if the individual had been using marijuana for pain control, he was doing it without a prescription from a doctor. Finally, it is important to remember that the use of marijuana is a violation of federal law even when it is permitted under state law.

In evaluating the evidence in this case, I considered the opinions of those witnesses who testified on the individual's behalf. Their cumulative testimony is entitled to only neutral weight, however. All three witnesses testified in only general terms about the individual's honesty, trustworthiness, and reliability.

10/ The individual told the OPM investigator that he used marijuana every week for a six month period in 1995 (Ex. 10 at 4) (24 weeks = 24 times) (Tr. at 84). He also told the OPM investigator that he used marijuana on a daily basis from July 1999 through February 2000 (243 days =243 times), and once in November 2001.

In the end, I believe that the individual's multiple violations of the drug certification cannot be absolved without diminishing the purpose and effect of the drug certification. In my opinion, a person's willingness to violate the drug certification more than 200 times increases the risk that there could be other breaches of trust. Allowing security clearance holders to pick and choose what rules or regulations they will or will not follow is simply unacceptable.

Based on all the foregoing considerations, I find that the individual has not mitigated the DOE's Criterion L concerns in this case.

3. Criterion K

The individual readily admits that he knew DOE's policy regarding the use of illegal drugs while possessing a security clearance. Ex. 10 at 3; Ex. 7 at 30; Tr. at 78. He argues, however, that he used the marijuana to relieve the pain associated with a limb amputation that occurred 30 years ago. He provided substantial medical documentation for the period covering 1996 to 2002 that supports his contention that he suffered from chronic pain because of the amputation. See Exs. A-D. The medical documents show that in 1998 after the state in which the individual resides passed a law permitting the use of marijuana for some medicinal purposes, the individual tried without success to find a physician who would prescribe marijuana. Those documents also show that he used a variety of prescription drugs, including marinol 11/, acupuncture, and other remedies to ease his pain.

It is the individual's contention that his marijuana use from 1999 to 2000 and in 2001 was for pain control and should be excused because he was using the drug for a legal purpose under state law. Tr. t 64, 94). Moreover, the individual submits that his marijuana use in 1995 should be mitigated due to the passage of time. *Id.* at 95. Finally, the individual claims that his pain has been alleviated somewhat since his March 2002 surgery and he will not use marijuana again unless he can find a physician to prescribe the drug. *Id.* at 64, 67.

While I am sympathetic to the individual's struggle with chronic pain, I am unable to find that his medical issues mitigate the DOE's Criterion K concerns. First, even though the state in which the individual resides passed a law in 1998 permitting the medicinal use of marijuana under certain circumstances, federal law still prohibits the use of marijuana. Even if I were to defer to the state law on this issue, I would find that there is no expert testimony in the record justifying the individual's use of marijuana under the relevant State statute. See Ex. H. Medical documentation in the record reflects that on June 15, 1999 one of the individual's doctors wrote, "I am not willing to write a Rx for marijuana at this point." Ex. A. Finally, the individual did not convince me that all of his marijuana use since his execution of the drug certification in 1989 has been for medicinal purposes. Specifically, the individual implied at the hearing that his use in 1995 with his wife was recreational rather than medicinal. Ultimately, I find that the individual's attempt to self-medicate his chronic

11/ Marinol is a synthetic form of marijuana.

pain with marijuana without the direction of, or under the guidance of, a physician cannot excuse his conduct under Criterion K.

In addition, I find that the individual's extensive, long-term use of marijuana also militates against a finding of mitigation in this case. By the individual's own admission he has used marijuana extensively over the last 25 years. While his use of the illegal drug from 1974 to 1979 and 1980 to 1987 is remote in time, his use during that period of time is relevant because it demonstrates a pattern of using illegal drugs. As for his six-month use of the illegal drug in 1995, it demonstrates that the individual's illegal drug use has ebbed and flowed over the course of time. This same pattern is evident when the individual abstained from using marijuana from some time in 1995 but resumed using the illegal drug in July 1999. The individual apparently stopped using marijuana in February 2000 but used it again in November 2001.

As a final matter, the individual did not convince me that he will not use illegal drugs again. The individual admitted at the hearing that he still is experiencing pain after the March 2002 surgery. Tr. at 64. He explained at the hearing that before his recent surgery, he rated his pain on a scale of 1 to 10 as an 8. *Id*. After the surgery, he rates that pain as a 6. *Id*. While the individual claimed that he will not use marijuana in the future without a prescription, I did not believe him. Assuming he was truthful in relating that his marijuana usage was solely for medicinal purposes, it seems likely to me that the individual might resort to using marijuana again because his pain is still present. In the end, the individual's extensive, long-term use of marijuana over the past 25 years, combined with his proclivity to self-medicate for pain control, does not permit me to make the predictive assessment that the individual will not use illegal drugs again.

V. Conclusion

As explained in this Decision, I find that the DOE properly invoked 10 C.F.R. § 710.8(f), (k), and (l) in suspending the individual's access authorization. After considering all the relevant information, favorable and unfavorable, in a comprehensive and common-sense manner, I find that the individual has failed to mitigate the security concerns associated with his falsifications, drug use, and multiple violations of his Drug Certification. Therefore, I conclude that the individual has not yet demonstrated that restoring his access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored. The individual may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

Ann S. Augustyn
Hearing Officer
Office of Hearings and Appeals

Date: August 5, 2003